

FILED  
13 AUG 13 AM 9:29

CLERK, U.S. DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA  
DEPUTY

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

CARL RUDOLPH SMALLS,  
Booking #12590339,

Plaintiff,

vs.

SAN DIEGO SHERIFF'S OFFICE;  
BILL GORE; SAN DIEGO COUNTY JAIL;  
CALIFORNIA DEPARTMENT OF  
CORRECTIONS,

Defendants.

Civil No. 13cv1405 WQH (MDD)

**ORDER:**

**(1) GRANTING MOTION TO  
PROCEED *IN FORMA PAUPERIS*  
(ECF Doc. No. 2)**

**(2) DENYING MOTIONS FOR  
APPOINTMENT OF COUNSEL  
AND FOR PRELIMINARY  
INJUNCTION (ECF Doc. Nos. 3, 4)**

**AND**

**(3) DISMISSING COMPLAINT FOR  
FAILING TO STATE A CLAIM  
PURSUANT TO 28 U.S.C.  
§§ 1915(e)(2)(B) & 1915A(b)**

Carl Rudolph Smalls ("Plaintiff"), currently incarcerated at George Bailey Detention Facility ("GBDF") in San Diego, California and proceeding pro se, has filed a civil rights Complaint pursuant to 42 U.S.C. § 1983. Plaintiff has also filed a Motion to Proceed *In Forma Pauperis* ("IFP") pursuant to 28 U.S.C. § 1915(a) (ECF No. 2), a Motion for Appointment of Counsel (ECF Doc. No. 3), and a Motion for Preliminary Injunctive Relief (ECF Doc. No. 4). In his Complaint, Plaintiff alleges that Defendants have violated his rights to free speech, due

process, and to receive adequate medical attention at GBDF. *See* Compl. at 3-5. Plaintiff's Complaint seeks both monetary and injunctive relief, but his Motion for a Preliminary Injunction focuses solely on the San Diego County Jail's restrictions on inmate mail. *See* Pl.'s Mot. Prelim. Inj. (ECF No. 4).

## **I. MOTION TO PROCEED IFP**

All parties instituting any civil action, suit or proceeding in a district court of the United States, except an application for writ of habeas corpus, must pay a filing fee of \$400. *See* 28 U.S.C. § 1914(a).<sup>1</sup> An action may proceed despite a plaintiff's failure to prepay the entire fee only if he is granted leave to proceed IFP pursuant to 28 U.S.C. § 1915(a). *See Rodriguez v. Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). However, a prisoner granted leave to proceed IFP remains obligated to pay the entire fee in installments, regardless of whether his action is ultimately dismissed. *See* 28 U.S.C. § 1915(b)(1) & (2); *Taylor v. Delatoore*, 281 F.3d 844, 847 (9th Cir. 2002).

The Court finds that Plaintiff has submitted an affidavit which complies with 28 U.S.C. § 1915(a)(1), and that he has attached a certified copy of his trust account statement pursuant to 28 U.S.C. § 1915(a)(2) and S.D. CAL. CIVLR 3.2. Plaintiff's trust account statement shows that he has insufficient funds from which to pay an initial partial filing fee. Accordingly, the Court **GRANTS** Plaintiff's Motion to Proceed IFP (ECF No. 2) and assesses no initial partial filing fee per 28 U.S.C. § 1915(b)(1). However, the Court further orders the Watch Commander at George Bailey Detention Facility to garnish the entire \$350 balance of the filing fees owed in this case, collect and forward them to the Clerk of the Court pursuant to the installment payment provisions set forth in 28 U.S.C. § 1915(b)(1).

## **II. MOTION FOR APPOINTMENT OF COUNSEL**

Plaintiff also requests the appointment of counsel to assist him in prosecuting this civil action. The Constitution provides no right to appointment of counsel in a civil case, however,

---

<sup>1</sup> In addition to the \$350 statutory fee, all parties filing civil actions *on or after May 1, 2013*, must pay an additional administrative fee of \$50. *See* 28 U.S.C. § 1914(a), (b); Judicial Conference Schedule of Fees, District Court Misc. Fee Schedule (eff. May 1, 2013). However, the additional \$50 administrative fee is waived if the plaintiff is granted leave to proceed IFP. *Id.*

1 unless an indigent litigant may lose his physical liberty if he loses the litigation. *Lassiter v. Dept.*  
2 *of Social Services*, 452 U.S. 18, 25 (1981). Nonetheless, under 28 U.S.C. § 1915(e)(1), district  
3 courts are granted discretion to appoint counsel for indigent persons. This discretion may be  
4 exercised only under “exceptional circumstances.” *Terrell v. Brewer*, 935 F.2d 1015, 1017 (9th  
5 Cir. 1991). “A finding of exceptional circumstances requires an evaluation of both the  
6 ‘likelihood of success on the merits and the ability of the plaintiff to articulate his claims pro se  
7 in light of the complexity of the legal issues involved.’ Neither of these issues is dispositive and  
8 both must be viewed together before reaching a decision.” *Id.* (quoting *Wilborn v. Escalderon*,  
9 789 F.2d 1328, 1331 (9th Cir. 1986)).

10 The Court denies Plaintiff’s request without prejudice because, for the reasons set out  
11 below, neither the interests of justice nor exceptional circumstances warrant appointment of  
12 counsel at this time. *LaMere v. Risley*, 827 F.2d 622, 626 (9th Cir. 1987); *Terrell*, 935 F.2d at  
13 1017.

### 14 **III. SCREENING PURSUANT TO 28 U.S.C. §§ 1915(e)(2) & 1915A(b)**

15 The Prison Litigation Reform Act (“PLRA”)’s amendments to 28 U.S.C. § 1915 also  
16 obligate the Court to review complaints filed by all persons proceeding IFP and by those, like  
17 Plaintiff, who are “incarcerated or detained in any facility [and] accused of, sentenced for, or  
18 adjudicated delinquent for, violations of criminal law or the terms or conditions of parole,  
19 probation, pretrial release, or diversionary program,” “as soon as practicable after docketing.”  
20 See 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(b). Under these provisions, the Court must sua  
21 sponte dismiss any prisoner civil action and all other IFP complaints, or any portions thereof,  
22 which are frivolous, malicious, fail to state a claim, or which seek damages from defendants who  
23 are immune. See 28 U.S.C. §§ 1915(e)(2)(B) and 1915A; *Lopez v. Smith*, 203 F.3d 1122, 1126-  
24 27 (9th Cir. 2000) (en banc) (§ 1915(e)(2)); *Resnick v. Hayes*, 213 F.3d 443, 446 n.1 (9th Cir.  
25 2000) (§ 1915A).

26 “To state a claim under 42 U.S.C. § 1983, the plaintiff must allege two elements: (1) that  
27 a right secured by the Constitution or laws of the United States was violated; and (2) that the  
28 alleged violation was committed by a person acting under color of state law.” *Campbell v.*

1 *Washington Dep't of Soc. Servs.*, 671 F.3d 837, 842 n.5 (9th Cir. 2011) (citing *Ketchum v.*  
2 *Alameda Cnty.*, 811 F.2d 1243, 1245 (9th Cir. 1987)).

3 First, to the extent Plaintiff alleges that the “San Diego County Sheriff’s Office,” the “San  
4 Diego County Jail,” and the “California Department of Corrections” have violated his  
5 constitutional rights, his Complaint fails to state a claim because these entities are not “persons”  
6 subject to suit under § 1983. Neither a local law enforcement department (like the San Diego  
7 County Sheriff’s Office), a jail (like the San Diego County Jail), or a state agency (like the  
8 California Department of Corrections), are proper defendants under § 1983. *See Vance v.*  
9 *County of Santa Clara*, 928 F. Supp. 993, 996 (N.D. Cal. 1996) (“Naming a municipal  
10 department as a defendant is not an appropriate means of pleading a § 1983 action against a  
11 municipality.”) (citation omitted); *Powell v. Cook County Jail*, 814 F. Supp. 757, 758 (N.D. Ill.  
12 1993) (“Section 1983 imposes liability on any ‘person’ who violates someone’s constitutional  
13 rights ‘under color of law.’ Cook County Jail is not a ‘person.’”);

14 While the County of San Diego *itself* may be considered a “person” and therefore, a  
15 proper defendant under § 1983, *see Monell v. Department of Social Services*, 436 U.S. 658, 691  
16 (1978); *Hammond v. County of Madera*, 859 F.2d 797, 801 (9th Cir. 1988), Plaintiff has not  
17 named the County as a Defendant. Moreover, as a municipality, the County *may* be held liable  
18 under § 1983—but only where the Plaintiff alleges facts to show that a constitutional deprivation  
19 was caused by the implementation or execution of “a policy statement, ordinance, regulation,  
20 or decision officially adopted and promulgated” by the County, or a “final decision maker” for  
21 the County. *Monell*, 436 U.S. at 690; *Board of the County Commissioners v. Brown*, 520 U.S.  
22 397, 402-04 (1997); *Navarro v. Block*, 72 F.3d 712, 714 (9th Cir. 1995). In other words,  
23 “respondeat superior and vicarious liability are not cognizable theories of recovery against a  
24 municipality.” *Miranda v. Clark County, Nevada*, 279 F.3d 1102, 1109-10 (9th Cir. 2002).  
25 “Instead, a *Monell* claim exists only where the alleged constitutional deprivation was inflicted  
26 in ‘execution of a government’s policy or custom.’” *Id.* (quoting *Monell*, 436 U.S. at 694).

27 As currently pleaded, Plaintiff’s Complaint fails to state a claim under 28 U.S.C.  
28 § 1915A(b) because he has failed to allege any facts which “might plausibly suggest” that either

1 the County itself, or any *individual* County employee (a “person”), like Sheriff Gore, violated  
2 his constitutional rights. *See Hernandez v. County of Tulare*, 666 F.3d 631, 637 (9th Cir. 2012)  
3 (applying *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)’s pleading standards to *Monell* claims);  
4 *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978) (42 U.S.C. § 1983 provides for relief only  
5 against those who, through their personal involvement as evidenced by affirmative acts,  
6 participation in another’s affirmative acts, or failure to perform legally required duties, cause the  
7 deprivation of plaintiff’s constitutionally protected rights). Moreover, while Plaintiff’s  
8 Complaint broadly challenges the facial validity of jail mail or other GBDF “policies” requiring  
9 “all inmates ... to wear shower shoes,” it further fails to contain “sufficient allegations of  
10 underlying facts” to show that Sheriff Gore, in either his official or individual capacity and with  
11 “final decision-making authority,” acted pursuant to an official municipal policy, custom or  
12 practice, with the requisite intent to *cause* a violation of *Plaintiff’s* First, Eighth, or Fourteenth  
13 Amendment rights. *Hernandez*, 666 F.3d at 637; *Monell*, 436 U.S. at 690; *Brown*, 520 U.S. at  
14 403; *Starr v. Baca*, 652 F.3d 1202, 1207-08 (9th Cir. 2011).

15 Accordingly, the Court finds that Plaintiff’s Complaint fails to state a viable section 1983  
16 claim against any of the currently named Defendants, it is therefore subject to sua sponte  
17 dismissal pursuant to 28 U.S.C. §§ 1915(e)(2) and 1915A(b). Because Plaintiff is proceeding  
18 *pro se*, however, the Court having now provided him with “notice of the deficiencies in his  
19 complaint,” will also provide him an opportunity to “effectively” amend. *See Akhtar v. Mesa*,  
20 698 F.3d 1202, 1212 (9th Cir. 2012) (citing *Ferdik v. Bonzelet*, 963 F.2d 1258, 1261 (9th Cir.  
21 1992)).

#### 22 **IV. MOTION FOR PRELIMINARY INJUNCTION**

23 Plaintiff has also submitted a Motion for a Preliminary Injunction pursuant to  
24 FED.R.CIV.P. 65 (ECF Doc. No. 4).

25 “A preliminary injunction is an extraordinary remedy never awarded as of right.” *Winter*  
26 *v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 24 (2008) (citation omitted). “The  
27 proper legal standard for preliminary injunctive relief requires a party to demonstrate ‘that he  
28 is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of

1 preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the  
2 public interest.” *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1127 (9th Cir. 2009) (quoting  
3 *Winter*, 555 U.S. at 20). “ “[S]erious questions going to the merits and a balance of hardships  
4 that tips sharply towards the plaintiff can support issuance of a preliminary injunction, so long  
5 as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction  
6 is in the public interest.” *Alliance for Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131–32 (9th Cir.  
7 2011) (internal quotation marks omitted). “Speculative injury does not constitute irreparable  
8 injury sufficient to warrant granting a preliminary injunction. A plaintiff must do more than  
9 merely allege imminent harm sufficient to establish standing; a plaintiff must demonstrate  
10 immediate threatened injury as a prerequisite to preliminary injunctive relief.” *Caribbean*  
11 *Marine Servs. Co. v. Baldridge*, 84 F.2d 668, 674 (9th Cir. 1988) (citations omitted). In sum,  
12 an injunction “may only be awarded upon a clear showing that the plaintiff is entitled to relief.”  
13 *Winter*, 555 U.S. at 22.

14 In addition, an injunction “binds only the following who receive actual notice of it by  
15 personal service or otherwise: (A) the parties; (B) the parties’ officers, agents, servants,  
16 employees, and attorneys; and (C) other persons who are in active concert or participation with  
17 [them].” FED.R.CIV.P. 65(d)(2). In general, “[a] federal court may issue an injunction if it has  
18 personal jurisdiction over the parties and subject matter jurisdiction over the claim; it may not  
19 attempt to determine the rights of persons not before the court.” *Zepeda v. INS*, 753 F.2d 719,  
20 727 (9th Cir. 1985). One “becomes a party officially, and is required to take action in that  
21 capacity, only upon service of summons or other authority-asserting measure stating the time  
22 within which the party served must appear to defend.” *Murphy Bros., Inc. v. Michetti Pipe*  
23 *Stringing, Inc.*, 526 U.S. 344, 350 (1999). The court may not attempt to determine the rights of  
24 persons not before it. *See, e.g., Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229, 234-35  
25 (1916); *Zepeda*, 753 F.2d at 727-28.

26 In this case, Plaintiff’s Motion for Preliminary Injunction, in which he seeks to “enjoin  
27 Defendants from enforcing unconstitutional jail mail policies to reject or otherwise censor news  
28 journals, subscription materials, book catalogs, and other correspondence,” Pl.’s Mot. Prelim.

1 Inj. at 1, must be denied for the same reasons his Complaint must be dismissed. In other words,  
2 because Plaintiff has failed to state a claim against any named Defendant, he necessarily cannot  
3 and has not yet shown that he is “likely to succeed on the merits” of any free speech claim, that  
4 “the balance of equities tips in his favor,” or that the issuance of an injunction in his case would  
5 serve the public interest. *Winter*, 555 U.S. at 20. Moreover, even if Plaintiff could satisfy all  
6 the *Winter* factors justifying extraordinary injunctive relief under Rule 65, at this stage of the  
7 proceedings, it simply lacks jurisdiction over any of the parties Plaintiff seeks to enjoin. *Zepeda*,  
8 753 F.2d at 727-28.

9 **V. CONCLUSION AND ORDER**

10 Good cause appearing, **IT IS HEREBY ORDERED** that:

11 1. Plaintiff’s Motion for Appointment of Counsel (ECF Doc. No. 3) and Plaintiff’s  
12 Motion for Preliminary Injunction (ECF Doc. No. 4) are **DENIED**.

13 2. Plaintiff’s Motion to proceed IFP pursuant to 28 U.S.C. § 1915(a) (ECF No. 2) is  
14 **GRANTED**.

15 3. The Watch Commander of George Bailey Detention Facility, or his designee, shall  
16 collect from Plaintiff’s inmate trust account the \$350 balance of the filing fee owed in this case  
17 by collecting monthly payments from the account in an amount equal to twenty percent (20%)  
18 of the preceding month’s income and forward payments to the Clerk of the Court each time the  
19 amount in the account exceeds \$10 in accordance with 28 U.S.C. § 1915(b)(2). **ALL**  
20 **PAYMENTS SHALL BE CLEARLY IDENTIFIED BY THE NAME AND NUMBER**  
21 **ASSIGNED TO THIS ACTION.**

22 4. The Clerk of the Court is directed to serve a copy of this Order on the **WATCH**  
23 **COMMANDER**, George Bailey Detention Facility, 446 Alta Road, Suite 5300, San Diego,  
24 California 92158.

25 **IT IS FURTHER ORDERED** that:

26 5. Plaintiff’s Complaint is **DISMISSED** without prejudice for failing to state a claim  
27 upon which relief may be granted pursuant to 28 U.S.C. § 1915(e)(2)(B) and § 1915A(b).  
28 However, Plaintiff is further **GRANTED** forty-five (45) days leave from the date this Order is

1 filed in which to submit a First Amended Complaint which cures all the deficiencies of pleading  
2 noted above. Plaintiff's Amended Complaint must be complete in itself without reference to  
3 his original pleading. *See* S.D. CAL. CIVLR 15.1. Defendants not named and any claims not re-  
4 alleged in the Amended Complaint will be considered waived. *See King v. Atiyeh*, 814 F.2d 565,  
5 567 (9th Cir. 1987).

6  
7 DATED: 8/9/13

  
HON. WILLIAM Q. HAYES  
United States District Judge